(2)

Supreme Court, U.S.
FILED

JUN 1 2001

OFFICE OF THE CLERK

No. 00-1655

IN THE

Supreme Court of the United States

CHRISTOPHER J. PARRY,

Petitioner,

v.

MOHAWK MOTORS OF MICHIGAN, INC.: AUSTINTOWN AMBULATORY ER; MEDEXPRESS; AND DRUG FREE, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOHAWK MOTORS OF MICHIGAN, INC'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LAURA JULIUS AVERY
Counsel of Record
ERIN STOTTLEMYER GOLD
REMINGER & REMINGER CO., L.P.A.
113 St. Clair Avenue, Suite 700
Cleveland, Ohio 44114-1273
(216) 687-1311
lavery@reminger.com

Attorneys for Respondent Mohawk Motors of Michigan, Inc.

Balmar Legal Publishing Services, Washington, DC 202-682-9800

18 pp

QUESTIONS PRESENTED FOR REVIEW

Whether Congress intended the Federal Motor Carrier Safety Regulations to provide a private right of action to commercial truck drivers who allege violations of the drug testing collection procedures after being disqualified for submitting a suspect urine sample and where the regulations themselves do not contemplate an express or implied remedy.

Whether a commercial truck driver properly selected for a random drug screen pursuant to the Federal Motor Carrier Safety Regulations fails to allege a *Bivens* claim for violations of his constitutional right to be free from unreasonable governmental searches and seizures where the claim is not timely asserted, no federal action is alleged, the alleged deviations from the collection procedures do not amount to constitutional violations, and the driver's own conduct affects his substantial interest in his continued employment.

STATEMENT PURSUANT TO RULE 29.6

Respondent Mohawk Motors of Michigan, Inc. is not a subsidiary or affiliate of a publicly owned corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

STATEMENT PURSUANT TO RULE 29.6 ii

TABLE OF AUTHORITIES iv

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. THE LOWER COURTS PROPERLY APPLIED THE TEST FOR AN IMPLIED PRIVATE RIGHT OF ACTION FOR VIOLATIONS UNDER THE FEDERAL MOTOR CARRIER SAFETY REGULATIONS AND, THEREFORE, DRIVERS SUBJECT TO RANDOM DRUG TESTING DO NOT HAVE AN INDEPENDENT CAUSE OF ACTION 3

II. PETITIONER FAILED TO ALLEGE AND CAN NOT DEMONSTRATE A *BIVENS* CLAIM FOR VIOLATION OF HIS CONSTITUTIONAL RIGHTS 7

CONCLUSION 10

APPENDIX

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF OHIO, EASTERN DIVISION, ORDER ENTERED JUNE 18,1999 ..... A1

TABLE OF AUTHORITIES

Cases **Page**

Abate v. S. Pacific Transp. Co., 928 F.2d 167 (5th Cir. 1991) 5

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, (1971) ..... i, 7, 8, 10

California v. Sierra Club, 451 U.S. 287, 293, 101 S.Ct. 1775 (1981) 3, 4

Cort v. Ash, 422 U.S. 66, 78, 95 S.Ct. 2080 (1975) 3

Drake v. Delta Airlines, Inc., 147 F.3d 169 (2nd Cir. 1998) 5, 8

First Pacific Bancorp, Inc. v. Helfer, 224 F.3d 1117 (9th Cir. 2000) 5

Hall v. United Labs, Inc., 31 F.Supp.2d 1039 (N.D. Ohio 1998) 5

Hammons v. Norfolk S. Corp., 156 F.3d 701, 704 (6th Cir. 1998) 8

Salomon v. Roche Compuchem Laboratories, Inc., 909 F.Supp.126 (E.D.N.Y. 1995) 5

Schmeling v. NORDAM, 97 F.3d 1336, 1343-44 (10th Cir. 1996) 5

Thompson v. Thompson, 484 U.S. 174, 179, 108 S.Ct. 513 (1998); 3

Transamerica Mortgage Advisors, Inc. v. Lewis, 44 U.S. 11, 23-24, 100 S.Ct. 242 (1979) 3

Touche Ross & Co. v. Redington, 442 U.S. 560, 575-76, 99 S.Ct. 2479 (1979) 3

Universities Research Association Inc. v. Coutu, 450 U.S. 754, 770, 101 S.Ct. 1451 (1981) 3, 5

Statutes and Regulations

28 U.S.C. § 1254(1) 1
49 U.S.C. § 31306 ..... 1, 4, 5
49 U.S.C. § 31306 *et. seq* 1
49 U.S.C. § 31136(a)(3) 6
49 C.F.R. § 40 ..... 4, 5
49 C.F.R. § 40, Docket OST-99-6678 6
49 C.F.R. § 40.25 ..... 2, 9
49 C.F.R. § 40.25(f)(13) 1
49 C.F.R. § 40.25(f)(16) 2
49 C.F.R. § 40.33 5
49 C.F.R. § 40.35 5
49 C.F.R. § 40.191(a) 2
49 C.F.R. § 40.191(c) 2
49 C.F.R. § 382 4
49 C.F.R. § 382.101 4
49 C.F.R. § 382.605 9
49 C.F.R. § 386 6
49 C.F.R. § 386.1 6
54 Fed. Reg. 230 at 49,854 (Dec. 1, 1989) 6

STATEMENT OF JURISDICTION

This case fails to invoke an important question of federal law under 28 U.S.C. § 1254(1), as the federal courts uniformly hold that no private right of action exists under the Federal Motor Carrier Safety Regulations for drivers who allege violations of the drug testing procedures. Therefore, this Court does not have jurisdiction to review the matters presented in the Petition.

STATEMENT OF THE CASE

This case arises from events on August 6, 1997 when Mohawk Motors randomly selected Petitioner for drug and alcohol testing. Petitioner's original Complaint included 11 causes of action, including claims for breach of employment contract, wrongful discharge, discrimination in violation of the Americans with Disabilities Act, and various violations of the federal Department of Transportation ("D.O.T.") regulations relating to random drug testing promulgated under the Federal Omnibus Transportation Employee Testing Act of 1991 ("FOTETA"), codified as it relates to commercial motor carriers at 49 U.S.C. § 31306 *et seq.*

Pursuant to federal mandate, Respondent Mohawk Motors of Michigan, Inc. maintains a drug-testing program for its drivers. Petitioner, a driver employed by Arnold J. Pritchard and his company A.P.I.C., was leased to Mohawk Motors. When Petitioner was randomly selected and appeared at the collection site for the drug screen on August 6, 1997, he submitted a urine specimen that felt unusually warm to the collector. The specimen was recorded at a higher temperature than Petitioner's body temperature. A specimen temperature outside a certain range constitutes a reason to believe that a specimen has been altered or substituted. 49 C.F.R. § 40.25(f)(13). Pursuant to D.O.T. regulations, whenever a person collecting the specimen has reason to believe that an individual has altered or substituted a specimen, a second specimen must be obtained as soon as

possible under direct observation at the collection site. 49 C.F.R. § 40.25(f)(16).

Petitioner admits that he was told he needed to stay at the testing facility to provide a second sample and that he knew he could not leave. Despite this knowledge, Petitioner left the testing facility and then later returned in an attempt to submit a second sample. Petitioner's leaving the test facility before the second specimen could be collected is considered a "refusal to test," which ended the test per D.O.T. regulations. 49 C.F.R. § 40.25. Specifically, the recently revised regulations provide that "[a]s an employee, you have refused to take a drug test if you: . . . [2] fail to remain at the testing site until the testing process is complete." 49 C.F.R. § 40.191(a) (Effective August 1, 2001). The regulations further state that "[a]s an employee, if you refuse to take a drug test, you incur the consequences specified under D.O.T. agency regulations for a violation of those D.O.T. regulations." 49 C.F.R. § 40.191(c) (Effective August 1, 2001). An employer is required to remove a driver from safety sensitive positions when there is a refusal to test. Thus, on August 6, 1997, Mohawk Motors' actions in stating that Petitioner could not immediately drive on its behalf were consistent with the regulatory scheme. Petitioner then took it upon himself to take his employer's tractor-trailer across state lines, which prompted the owner to initiate criminal proceedings against him and terminate Petitioner's employment.

REASONS FOR DENYING THE WRIT

I.

THE LOWER COURTS PROPERLY APPLIED THE TEST FOR AN IMPLIED PRIVATE RIGHT OF ACTION FOR VIOLATIONS UNDER THE FEDERAL MOTOR CARRIER SAFETY REGULATIONS AND, THEREFORE, DRIVERS SUBJECT TO RANDOM DRUG TESTING DO NOT HAVE AN INDEPENDENT CAUSE OF ACTION.

This Court established a four-prong test for determining whether a private cause of action can be implied from a statutory scheme in *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080 (1975). The factors include (1) whether the plaintiff is one for whose special benefit the statute was enacted; (2) whether there is an indication of legislative intent in the statute to provide or deny a private remedy; (3) whether a private remedy is consistent with the underlying legislative scheme; and (4) whether the cause of action is one traditionally relegated to state law. *See also Thompson v. Thompson*, 484 U.S. 174, 179, 108 S.Ct. 513 (1988); *Universities Research Association, Inc. v. Coutu*, 450 U.S. 754, 770, 101 S.Ct. 1451 (1981). Although this Court has modified somewhat the factors taken into account in determining whether a private right of action can be implied from a regulatory scheme, the ultimate issue to be determined is whether Congress intended to create a private right of action. *California v. Sierra Club*, 451 U.S. 287, 293, 101 S.Ct. 1775 (1981).

In determining whether a private remedy exists, although the *Cort* test is relevant, each prong of the four-factor test is not entitled to equal weight. *Transamerica Mortgage Advisors, Inc v. Lewis*, 44 U.S. 11, 23-24, 100 S.Ct. 242 (1979), *quoting Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76, 99 S.Ct. 2479 (1979). The first two factors of the *Cort* test look not only at who benefits from the

legislation, but whether Congress intended to confer federal rights. *Sierra Club*, 451 U.S. at 294-97. The remaining two factors only become relevant if the first two factors indicate a Congressional intent to create a private remedy. *Id.*

The statute through which Petitioner seeks to imply a private right of action, 49 U.S.C. § 31306, provides that the Secretary of Transportation shall prescribe regulations requiring motor carriers to conduct testing for controlled substance use by operators of commercial motor vehicles. The D.O.T., in 49 C.F.R. § 40, describes required procedures for conducting workplace drug and alcohol testing for the federally regulated transportation industry, including commercial motor carriers. The Federal Motor Carrier Safety Administration ("FMCSA") provides drug and alcohol testing requirements for carriers and commercial driver's license holders. *See* 49 C.F.R. § 382. The purpose of this part is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial motor vehicles. 49 C.F.R. § 382.101.

The statute and regulations governing drug and alcohol testing of employees placed in safety sensitive positions, such as tractor-trailer operators, do not explicitly provide for a private cause of action. Therefore, Petitioner must look to the legislative scheme to determine whether a private right of action exists by implication. The courts below correctly held that it does not.

In analyzing whether Congress intended to confer federal rights upon Petitioner and drivers generally, it is important to note that while it is possible for Petitioner to benefit from the statute and regulations, the analysis does not end with the fact that Petitioner may have been an intended beneficiary. Petitioner must also establish that Congress intended to confer federal rights upon him and other individual commercial drivers placed in safety-sensitive positions. Where a statute does no more than state a general prescription of conduct, it implies no private remedy. *Sierra Club*, 451 U.S. at 294;

Universities Research, 450 U.S. at 772. Further, this Court previously has construed Congressional silence concerning remedies as indicative that Congress was not concerned with private rights. *Id.*

In this case, 49 U.S.C. § 31306 is framed as a general mandate to the Secretary of Transportation to establish drug-testing programs for operators of commercial motor vehicles. Therefore, the statute, which is nothing more than a general prescription of conduct, implies no private right of action. Equally significant, in addition to the courts below in this case, the federal courts uniformly hold that this specific regulatory scheme as contemplated by Congress does not demonstrate a concern for the protection of drivers who believe they have been aggrieved through the drug testing process. *See, e.g., Salomon v. Roche Compuchem Laboratories, Inc.*, 909 F.Supp.126 (E.D.N.Y. 1995) (concluding that 49 C.F.R. § 40 was framed as a general mandate to establish drug testing regulations and was not created for a specific class of persons); *Drake v. Delta Airlines, Inc.*, 147 F.3d 169, 170-71 (2d Cir. 1998) (finding no private cause of action of 49 C.F.R. § 40); *Hall v. United Labs, Inc.*, 31 F.Supp.2d 1039 (N.D. Ohio 1998) (finding there is no evidence that Congress contemplated individual enforcement actions under 49 C.F.R. § 40.33 and declining to fashion a new remedy for the enforcement of drug testing regulations); *Schmeling v. NORDAM*, 97 F.3d 1336, 1343-44 (10th Cir. 1996) (concluding that 49 C.F.R. § 40.35 does not provide for a private cause of action); *Abate v. S. Pacific Transp. Co.*, 928 F.2d 167 (5th Cir. 1991) (concluding that Federal Railroad Safety Act provides no private cause of action to enforce regulations implementing federally mandated drug-testing programs set forth in 49 C.F.R. § 40).

Petitioner's reliance on *First Pacific Bancorp, Inc. v. Helfer*, 224 F.3d 1117 (9th Cir. 2000), which involves a statutory scheme governing the FDIC to ensure the maintenance of failed banks, is misguided. In that case, shareholders challenged portions of the statute that required

accounting and record keeping where they were not provided with relevant reports. The Ninth Circuit Court of Appeals reasoned that, because bank shareholders were entitled to receive certain reports mandated under the statute, they were intended beneficiaries and thus entitled to a private right of action. Petitioner stretches this holding to imply that because the D.O.T. regulations in this instance require reporting of test results to both employers and those being tested, so too a private right of action must exist, *for any reason*, under the regulations. Petitioner's arguments to this Court, however, do not contemplate a violation of a reporting provision, but the procedures adhered to prior to the resulting report.

Looking to the intent of Congress in enacting FOTETA, there appears no similar indication of intent to create a remedy for Petitioner. Rather, the intent is to bestow upon the D.O.T. the authority to impose regulations that ensure the "physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely." 49 U.S.C. § 31136(a)(3). Moreover, the D.O.T. expressly provides for the enforcement of the drug testing regulations through an administrative remedy. *See* Enforcement Considerations, 54 Fed. Reg. 230 at 49,854 (Dec. 1, 1989). Further, 49 C.F.R. § 386 establishes procedures to monitor violations or failure to comply with the provisions of the statute and regulations. 49 C.F.R. § 386.1. The regulations go no further than to demonstrate an intention by Congress to monitor alleged violations thereunder. Indeed, the extensive enforcement and investigative mechanisms are a strong indication that Congress did not envision a private right of action for Petitioner or those drivers similarly situated. Further evidencing the lack of Congressional intent, when the regulations were recently revised with an effective date of August 1, 2001, there was no mention of an intent to create a cause of action. Instead, the revised rules make clearer the mechanisms available for noncompliance with the testing regulations. Department of Transportation, Office of the Secretary, 49 C.F.R. § 40, Docket OST-99-6678.

Accordingly, the uniformity of the lower courts on this issue and the sound reasoning consistently applied throughout the federal courts in arriving at the conclusion that no private right of action exists under the D.O.T. guidelines obliges this Court to decline discretionary review over this matter.

II.

PETITIONER FAILED TO ALLEGE AND CAN NOT DEMONSTRATE A *BIVENS* CLAIM FOR VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

Petitioner's contention that he sufficiently alleged constitutional violations derive from the District Court's refusal to grant him leave to amend the First Amended Complaint to allege constitutional violations under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, (1971). (A-1). The substantive flaws notwithstanding, Petitioner's constitutional arguments are fraught with procedural shortcomings that diminish the value of further appellate review. Indeed, Petitioner fails to point out that in his brief before Sixth Circuit Court of Appeals, he conceded that he did not properly allege a "*Bivens* action." Moreover, Petitioner did not request leave to amend until nine months after filing the First Amended Complaint, one year after filing his initial Complaint, and two and one-half months after the District Court granted summary judgment to the Respondents and denied Petitioner's motion for reconsideration.

Now, Petitioner contends that his First Amended Complaint sufficiently set forth allegations of constitutional violations and thus a *Bivens* action. Regardless, the District Court and the Sixth Circuit Court of Appeals correctly held that granting Petitioner leave to amend the Complaint was untimely, prejudicial, and futile. A *Bivens* claim is one for damages arising out of the violation of one's constitutional rights due to another's conduct under color of federal law. As acknowledged by the Court of Appeals below, a *Bivens* action

may arise against a private corporation under certain circumstances. *See Hammons v. Norfolk S. Corp.*, 156 F.3d 701, 704 (6th Cir. 1998). Petitioner never alleged or attempted to demonstrate that the Respondents engaged in federal action. Instead, he relied exclusively on the D.O.T. guidelines as implying a private right of action for violations thereunder.

Moreover, even assuming a *Bivens* action was properly alleged, Petitioner is unable to demonstrate a violation of his constitutional rights. Petitioner argues that the random test and request for a second test were unreasonable searches and seizures under the Fourth Amendment. He does not argue that the procedure for selecting his name for testing was randomly administered or unreasonable, thus distinguishing Petitioner's reliance on *Drake v. Delta Airlines, Inc.*, 147 F.3d 169 (2nd Cir. 1998). Petitioner concentrates instead on the perceived flaws in the collection and testing procedures, which do not give rise to a claim for constitutional violations under *Bivens*.

Indeed, the procedures promulgated by the D.O.T. are designed to ensure accuracy of the test result. Petitioner, however, produced no facts demonstrating that the testing mechanisms identified, such as the time delay in taking the specimen's temperature, altered custody forms, unattended specimen, use of the ear thermometer, or the manual specific gravity test, compromised the integrity of the sample or inappropriately affected the specimen collector's observations. He further produced no facts demonstrating that the specimen ultimately tested was adulterated by the testing process or that the result was inaccurate. To the contrary, Petitioner's test results were negative for drug use. Further, the specific gravity as initially measured by hand at the testing facility was confirmed by the testing laboratory, strongly suggesting that the specimen provided could not have been urine. Petitioner does not challenge the ultimate results of the test. In whole or in part, Petitioner did not demonstrate that any of the collection procedures exceeded the scope of the "search" or diminished confidence in the reliability of the

results. Therefore, he can not demonstrate that the procedures used to collect and test the first sample were unreasonable.

Petitioner's argument that the request for the second test was more unreasonable is derivative of the procedures utilized in the collection of the first sample. He does not challenge the demand as lacking reasonable suspicion or randomness. A mere request for a second test during the collection process does not rise to the level of an unreasonable search and seizure, particularly where the D.O.T. regulations require a second test under circumstances suggesting an altered or substituted specimen. *See* 49 C.F.R. § 40.25. Moreover, even assuming that the first sample was collected in violation of the D.O.T. regulations, those regulations do not necessarily establish the constitutional boundaries of reasonableness. To the contrary, the regulations attempt to ensure optimal reliability of the results. The reliability of both samples thus was elevated by requiring Petitioner to remain on the premises so as to ensure that the second specimen was close in time and of comparable quality to the first.

Equally fatal to the significance of further review of Petitioner's constitutional allegations is the lack of a relationship between the alleged unreasonableness of the search to Petitioner's continued employment, the substantial interest alleged to be at issue. Although he continues to maintain otherwise, Petitioner admitted under oath that he knew he had to stay at the facility but left before providing the second sample. Since the second test could not be performed, the test ended per D.O.T. regulations. *See* 49 C.F.R. § 40.25. Thus, Petitioner's disqualification or removal from the safety-sensitive position was a consequence of his voluntary failure to complete the test rather than a positive or unreliable test result. Had he then not absconded with his employer's tractor-trailer, he would have been eligible for rehabilitation per the D.O.T. regulations and then to continue driving for Mohawk Motors once treated and re-tested pursuant to 49 C.F.R. § 382.605. Petitioner's own actions, rather than abuse of the collection process, resulted in his termination.

Accordingly, Petitioner has no plausible basis by which to assert a cause of action for the violation of his constitutional rights under *Bivens*.

CONCLUSION

For all of the foregoing reasons, Respondent Mohawk Motors respectfully submits that the issues raised by Petitioner in the Petition for Writ of Certiorari fail to address compelling reasons for review and the Writ should therefore be denied.

Respectfully submitted,

LAURA JULIUS AVERY
Counsel of Record
ERIN STOTTLEMYER GOLD
REMINGER & REMINGER CO., L.P.A.
113 St. Clair Avenue, Suite 700
Cleveland, Ohio 44114-1273
(216) 687-1311
lavery@reminger.com

Attorneys for Respondent Mohawk Motors of Michigan, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CHRISTOPHER J. PARRY,

Plaintiff,

vs.

ARNOLD J. PRITCHARD, et al.,

Defendants

CASE NO. 1:98CV179
Judge John M. Manos

ORDER
Entered June 18, 1999

On January 27, 1998, Christopher J. Parry, plaintiff, brought suit against numerous defendants arising out of a random drug test he was required to take. On March 25, 1999, the Court granted summary judgment to the following four Defendants: (1) Mohawk Motors of Michigan, Inc., ("Mohawk"), (2) Med Express Memphis ("Med Express"), (3) Drug Free, Inc. (Drug Fee"), and (4) Austintown Ambulatory Emergency Room, Inc. ("Austintown"). On April 13, 1999, the Plaintiff filed a Motion For Reconsideration, which was denied on May 26, 1999.

On June 8, 1999, the Plaintiff filed a Motion For Leave To File a Second Amended Complaint to allege a Bivens action and bring these Defendants back into the case. Generally, Bivens actions are actions for damages arising out of a violation of one's federal constitutional rights by another acting under color of federal law. See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S.

388 (1971). For the following reasons, the motion is DENIED.

The Plaintiff presumably will rely on Hammons v. Norfolk Southern Corp., 156 F.3d 701 (6th Cir. 1998), which is described in the Court's opinion denying the Motion For Reconsideration. That case left open the issue of whether a corporation engages in federal action by administering a federal drug testing program. Based on the facts described in the Court's previous opinions, the Court finds the federal action requirement of a Bivens action cannot be met.

In addition, as described in the Court's previous opinion, the Plaintiff in Hammons was given twenty-four allegedly "random" drug tests in a year and a half. Although such abuse, if proven, may invoke the Fourth Amendment right against unreasonable searches and seizures, no similar facts can be alleged here. The facts of this case cannot support a constitutional violation.

In the original Complaint, the Plaintiff brought a claim under 42 U.S.C. § 1983 for a deprivation of constitutional rights under color of state law. He dropped this claim in the Amended Complaint. He argues that the similarities between a Bivens action and a 1983 action justify leave to amend the Complaint once more. The 1983 claim, however, stemmed from Defendant Pritchard's alleged filing of a false police report accusing the Plaintiff of steeling Pritchard's truck. This claim bears no relationship to the four Defendants at issue here, and could not constitute federal action to support a Bivens claim.

For the foregoing reasons, the Plaintiff's Motion For Leave To File a Second Amended Complaint is DENIED.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES DISTRICT JUDGE